

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALEXIUS R. BAESL
Claimant

VS.

R S STAFFING SERVICES INC.
Respondent

AND

**UNITED STATES FIDELITY
AND GUARANTY CO.**
Insurance Carrier

Docket No. 1,031,930

ORDER

Respondent and its insurance carrier requested review of the June 23, 2009 Award by Administrative Law Judge (ALJ) Marcia Yates Roberts. The Board heard oral argument on October 6, 2009.

APPEARANCES

Thomas P. Bryant, of Kansas City, Missouri, appeared for the claimant. Heather E. Hutsell, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument respondent conceded that the average weekly wage found by the ALJ was correct and should be used assuming this claim is found compensable. Similarly, assuming this claim is found to be compensable respondent also agreed that both the temporary total disability benefits (4.71 weeks) and medical bills incurred in connection with claimant's injury should be paid. The medical bills from the emergency room and Concentra are to be classified as authorized medical treatment, with the sole exception of

the bills tendered by claimant's private physician(s) which are to be submitted as unauthorized medical care and subject to the statutory \$500 allowance.¹

ISSUES

The ALJ concluded the claimant established she was injured in an accident arising out of and in the course of her employment on July 19, 2006. The ALJ went on to award her permanent partial disability compensation based upon a 19 percent impairment to the whole body,² 4.71 weeks of temporary total disability benefits as well as payment of all unpaid medical expenses other than those from her personal physician, which were to be submitted and paid as unauthorized medical pursuant to K.S.A. 44-510h(b)(2).

Respondent has appealed contending the ALJ erred in her conclusion that claimant sustained an accidental injury arising out of and in the course of claimant's employment. Simply put, respondent maintains the over 2 hour long video³ of the area where claimant was assigned to work conclusively establishes that claimant did not have an accident on July 19, 2006 at approximately 6:00 p.m. as she claims. Accordingly, respondent maintains the ALJ's Award should be summarily reversed.

In the alternative, respondent argues that claimant's impairment as a result of her alleged accident is zero percent, as indicated by Dr. Hendler, a physician retained by respondent to examine claimant during the course of this litigation. Respondent suggests Dr. Hendler's opinions are far more reliable than those offered by Dr. Poppa, a physician retained by claimant's counsel to perform an examination and evaluation of claimant's impairment and need for restrictions.

Claimant urges the Board to affirm the ALJ's Award in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

¹ Claimant indicates in her brief that she does not contest the ALJ's decision with respect to the medical expenses and asks that it be affirmed.

² All ratings in this claim are to the body as a whole.

³ At various times in the depositions this videotape is sometimes referred to as a DVD. The video was submitted to the Court in a DVD format but the ALJ referred to it as a CD. For purposes of consistency the Board will utilize the term "video".

The Board finds that the ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, the Appeals Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

Highly summarized, claimant alleges an injury occurred while working on July 19, 2006 when she missed a step while climbing down a stepladder. Claimant alleges she injured her neck and back in this accident. She has been treated conservatively and never returned to her job with respondent.

During the course of the litigation, claimant identified the area where her accident occurred. Respondent produced a video that depicts the area where claimant was assigned and stridently contends the video conclusively proves that claimant was not injured as she says.

The ALJ concluded as follows:

Claimant has met her burden of proof that she sustained injury arising out of and in the course of her employment with [r]espondent on July 19, 2006. After reviewing the CD's [sic], the court concludes that the activities depicted on the video at the date-stamped times corroborates [c]laimant's version of events leading to her accident and injury. It is clear from viewing the various diagrams of [c]laimant's work station by the witnesses that there are shelves of stock from which [c]laimant was required to retrieve boxes that are not depicted on the video. Claimant promptly reported her injury to her superiors and has consistently given the history and mechanism of injury each time she was asked by the physicians or testified to at depositions and hearings. K.S.A. 44-508(e) does not require the injury to be of such character as to present external or visible signs of its existence. The court finds her testimony to be credible and supported by the evidence.⁴

The Board has reviewed the evidence contained within the record and wholeheartedly agrees with the ALJ's findings and conclusions. The video respondent champions clearly shows claimant's work activities on July 19, 2006 and both parties agree that at no time during this two-hour period does the video show claimant's accident. But more importantly, there are a number of times, *including at 6:00 p.m., the approximate time of claimant's accident*, where claimant is not seen on the video. She has gone elsewhere in the area to retrieve pharmaceutical products. For example, at 6:00 p.m. claimant is not seen on the video. Then at 6:05 p.m. the video shows claimant returning with a cart loaded with boxes.⁵ In fact, at numerous times during this two-hour video claimant is outside the

⁴ ALJ Award (June 23, 2009) at 6-7.

⁵ Farquar Depo. at 26.

camera's view, sometimes for as long as 10 minutes, all the while retrieving product to be shipped out.⁶ Her activities may or may not have been captured on any one of the other video cameras installed in the area, but those tapes were not provided. Thus, while the video that was provided certainly has some relevance to this claim, it does not, as respondent hopes, conclusively disprove claimant's recitation of the events.

Like the ALJ indicates, claimant has consistently explained how she was injured. Her description and handwritten diagram is, admittedly, inconsistent with the diagram provided by respondent due to claimant's failure to orientate the fixtures in the room accurately. But the Board concludes that under these facts and circumstances that inaccuracy does not significantly impair claimant's credibility. Moreover, respondent's suggestion that claimant has a "history of dishonesty"⁷ and cannot be believed is hyperbole at best. Ten years ago claimant wrote a check at a grocery store that inadvertently resulted in an overdraft. That fact, standing alone, does not establish a pattern or practice of dishonesty and respondent is disingenuous in suggesting that it should.

The Board finds the ALJ's conclusion that claimant was injured in an accident arising out of and in the course of her employment with respondent on July 19, 2006 is hereby affirmed. Pursuant to the parties' agreement, respondent is further ordered to pay the temporary total disability benefits (4.71 weeks) and the medical bills as directed by the ALJ.

Turning now to the nature and extent of claimant's impairment, the ALJ adopted Dr. Poppa's evaluation of claimant's condition (19 percent impairment) inasmuch as that was the only medical evaluation contained within the record. Dr. Hendler, the physician retained by respondent, examined claimant January 23, 2009, but concluded based upon the contents of the video, that claimant's accident did not occur and therefore, any physical problems she may have were not related to any such accident. Thus, she had a zero percent impairment. That left Dr. Poppa's impairment assessment of 19 percent as the single rating available to the ALJ to consider.

The Board finds the ALJ's decision to adopt the 19 percent impairment rating offered by Dr. Poppa should be affirmed. Dr. Hendler's opinion can be easily disregarded as he, in essence, testified that since the video did not reveal that any accident occurred, it could not have occurred as claimant says so her impairment is zero percent. As indicated above, the video is not determinative under these facts. So his opinion is of little consequence.

⁶ *Id.* at 39-40.

⁷ Respondent's Brief at 8 (filed July 31, 2009).

Respondent's criticism of Dr. Poppa is aimed at his inclusion of 10 percent impairment for claimant's low back complaints, including radiculopathy. Dr. Poppa concedes that claimant's radiculopathy has not been confirmed by an EMG. But claimant's complaints have, since the date of her accident, consistently involved radiating pain into her legs. These complaints continued up to and including Dr. Poppa's examination in May of 2007. Under these facts and circumstances, the Board agrees with the ALJ's conclusions. The Award is, therefore, affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Marcia Yates Roberts dated June 23, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas P. Bryant, Attorney for Claimant
Heather E. Hutsell, Attorney for Respondent and its Insurance Carrier
Marcia Yates Roberts, Administrative Law Judge